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No. .....

IN THE

Supreme Court of the United States

October Term, 1979

UNITED STEELWORKERS OF AMERICA, AFL-CIO-CLC,
Petitioner,

v.

LAURA DUNBAR, et al., MARY WOOD, et al.,
BERNICE JOHNSON, et al., and
THARON RAWSON, et al.

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF IDAHO

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TABLE OF CONTENTS

	Page
Opinions Below	1
Jurisdiction	2
Question Presented	2
Statutory Provisions Involved	2
Statement of the Case	2
Reasons for Granting the Writ	10
Conclusion	18

TABLE OF AUTHORITIES

Cases:

Bazarte v. United Transportation Union, 429 F.2d 868 (3rd Cir. 1970) 12

Brooks v. N.J. Manufacturers Insurance Co., 170 N.J. Superior Ct. 20, 405 A.2d 466, 103 LRRM 2136 (N.J. Sup. Ct., App. Div., 1979) 16

Brough v. United Steelworkers of America, 437 F.2d 748 (1st Cir. 1971) 16

Bryant v. International Union, United Mine Workers, 467 F.2d 1 (6th Cir. 1972), cert. denied, 410 U.S. 910 (1973) 15, 16

Carollo v. Forty-Eight Insulation, Inc., 252 Pa. Superior Ct. 422, 381 A.2d 990 (1977) 16

Construction Laborers v. Curry, 371 U.S. 542 (1963) .. 8

Cox Broadcasting Corp. v. Cohn, 420 U.S. 469 (1975) 8, 9

De Arroyo v. Sindicato Trabajadores Packinghouse, 425 F.2d 281 (1st Cir. 1969), cert. denied, 400 U.S. 877 (1970) 12

Dente v. International Organization of Masters, Mates and Pilots, 492 F.2d 10 (9th Cir. 1974) 12

Page

Electrical Workers v. Foust, 442 U.S. 42 (1979) 11

Farmer v. General Refractories Co., ——Pa. Superior Ct. ——, —— A.2d —— (Pitt. Div., No. 991, Oct. 26, 1979) 16

Farmer v. United Brotherhood of Carpenters, 430 U.S. 290 (1977) 10

Hake v. Helton, 564 S.W. 2d 313 (Ct. App. No. 28,896), cert. denied, 439 U.S. 959 (1978) 11, 15

Higley v. Disston, Inc., —— P.2d ——, 92 LRRM 2443 (Wash. Sup. Ct., 1976) 16

House v. Mine Safety Appliance Co., 417 F.Supp. 939 (D. Idaho, 1976) 16

Humphrey v. Moore, 375 U.S. 335 (1964) 10, 11

Linn v. Plant Guard Workers, 383 U.S. 53 (1966) 10

Louisville & N.R. Co. v. Mattlers, 211 U.S. 149 (1908) 16

Machinists v. Gonzalez, 356 U.S. 617 (1958) 10

Motor Coach Employees v. Lockridge, 403 U.S. 274 (1971) 13

NLRB v. Gulf Power Co., 384 F.2d 822 (5th Cir. 1967) 13

Sears, Roebuck v. San Diego County District Council of Carpenters, 436 U.S. 180 (1978) 10

Steelworkers v. Bouligny, Inc., 382 U.S. 145 (1965) .. 16

Teamsters Union v. Morton, 377 U.S. 252 (1964) 11

Vaca v. Sipes, 386 U.S. 171 (1967) 10, 11, 15

Statutory Provisions:

Idaho Tort Claims Act, I.C. § 6-904 10

Idaho Wrongful Death Act, I.C. § 5-311 3

Page

National Labor Relations Act of 1935, 29 U.S.C. § 159 (a) 2, 11

Other:

BNA, Daily Labor Report, Sept. 13, 1978 13

Cox, *Labor Law Preemption Revisited*, 85 Harv. L. Rev. 1337 (1972) 12

Legislative History of the Occupational Safety and Health Act of 1970, prepared by the Senate Committee on Labor and Public Welfare 14

Report of National Commission on State Workmen's Compensation Laws (GPO 1972) 14

Safety Policies and the Impact of OSHA (BNA May 1977) 13

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PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF IDAHO

United Steelworkers of America, AFL-CIO-CLC (hereinafter "Steelworkers" or "the Union") hereby petitions for a writ of certiorari to the Supreme Court of the State of Idaho to enable this Court to review that court's decision in *Dunbar, et al. v. United Steelworkers of America, et al.* (decided September 13, 1979).

OPINIONS BELOW

The opinion of the District Court of the First Judicial District of the State of Idaho, Shoshone County, is not officially reported, but is reprinted at App. 6a-9a.[1] The opinion of the Supreme Court of Idaho is not officially reported but is reprinted at App. 10a-59a.

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[1] The Appendix to this petition shall at all times herein be referred as "App.".

JURISDICTION

The opinion and judgment of the Supreme Court of the State of Idaho were issued on September 13, 1979. The Union's timely petition for rehearing was denied on November 23, 1979 (App. 60a). The federal question presented herein was raised in and decided by both the trial court and the Idaho Supreme Court. On February 12, 1980, Mr. Justice Rhenquist signed an order extending the time for filing a petition for a writ of certiorari to and including March 21, 1980 (App. 61a). This Court has jurisdiction pursuant to 28 U.S.C. § 1257(3).

QUESTION PRESENTED

Whether the federal duty of fair representation preempts state law negligence actions, by employees injured or killed in on-the-job accidents, challenging the manner in which their union administered and enforced the safety and health provision of the collective bargaining agreement.

STATUTORY PROVISIONS INVOLVED

The National Labor Relations Act of 1935, as amended, 29 U.S.C. § 151 *et seq.*, provides, in pertinent part:

> Sec. 9 (a) [29 U.S.C. § 159(a)] Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment[.] • • •

STATEMENT OF THE CASE

On May 2, 1972, a fire occurred at the Sunshine Mine in northern Idaho. It resulted in the deaths of ninety-one miners who were working underground in the mine on that day. The miners were represented by Steelworkers which had negotiated a collective bargaining agreement establishing their wages, hours and various terms and conditions of employment, including provisions covering safety and health in the mine.

Four separate but identical complaints were filed in state court by individual widows, for and on behalf of themselves and their minor children (App. 11a).[2] The complaints name as co-defendants Steelworkers and the State of Idaho. With respect to Steelworkers, those actions were "brought pursuant to the Idaho Wrongful Death Act [I.C. § 5-311]." The complaints allege that Steelworkers "owed the Plaintiffs' decedent the duty of due care under th[at] Idaho law" (App. 3a) and violated the duty by performing certain designated representational services "negligently." Specifically, the allegations are that Steelworkers

> "undertook to act as accident prevention representative and enforcer of the Company-Union agreement and did it negligently, to wit:
>
> A) It misrepresented its safety concern and expertise to the rank and file.
>
> B) It failed to develop adequate program for its union representatives.
>
> C) It undertook to provide representatives who inspected and pretended to enforce the contractual accident prevention clauses, and did so negligently, to-wit:
>
> 1) It failed to require mine evacuation on first evidence of smoke underground;
>
> 2) It failed to require fire drills;
>
> 3) It failed to require personal protective equipment
>
> 4) It failed to require adequate protection against spontaneous combustion of discarded timbers underground.

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[2] The cases were consolidated for all purposes in the trial court below.

5) It failed to require adequate emergency egress from the mine. (App. 3a-4a).

The complaints further allege that each of the above-quoted negligent acts and omissions "was jointly and severally a proximate cause" of the miners' deaths (App. 4a). Each of plaintiffs demanded a jury trial and each sought, *inter alia,* $750,000 in general damages (*Ibid.*).

In district court, after the culmination of discovery by all parties, Steelworkers moved to dismiss or, alternatively, for summary judgment on the ground that plaintiffs' actions in negligence do not state a remediable claim because they are pre-empted by the federally created duty of fair representation which governs unions in such functions as administering and enforcing provisions of a collective bargaining agreement. Steelworkers position was that, as reflected by the allegations of the complaints (quoted above), it was being sued solely for the manner in which it performed as the exclusive representative of the bargaining unit employees, including the deceased miners, in particular for its alleged inadequacy in administering and enforcing the safety and health provision of the collective bargaining agreement in effect between Steelworkers and Sunshine.[3] In support of its motion for summary judgment,

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[3] Article IX of the pertinent agreement, captioned "Safety and Health," provides in full as follows:

ARTICLE IX
Safety and Health

1. The Company and the Union will continue to cooperate toward the objective of eliminating accident and health hazards. The Company shall continue to make reasonable provisions for the safety and health of its employees at the plant during the hours of their employment. Protective devices, wearing apparel, and other equipment necessary to protect employees from injury shall be provided by the Company in accordance with practices now prevailing in each separate department or as such practices may be improved from time to time by the Company.

Steelworkers submitted affidavits of its staff representative Marshall and local union safety committeeman Pedersen which showed that: (1) Steelworkers was certified by the National Labor Relations Board as the exclusive bargaining agent of a unit of Sunshine employees in 1954; (2) thereafter Steelworkers negotiated a series of consecutive collective bargaining agreements that included, *inter alia,* a safety and health article; and (3) in turn, the representational services provided by the local union safety committeemen on behalf of bargaining unit employees—including participation in monthly tours of various areas of the mine and attendance at safety committee meetings with management—were performed pursuant to the negotiated safety and health contract provision and were directly related to the Union's contract administration and enforcement role. These affidavits were uncontroverted.

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2. An employee who believes that he is being required to work under conditions which are unsafe beyond the normal hazards inherent in the operation in question, may request an immediate meeting with the shift boss, with or without consultation with his Assistant Grievance Committeeman. If, as a result of these actions, the employee still believes he is being required to work under conditions which are unsafe beyond the normal hazards inherent in the operation in question, a committee consisting of two (2) supervisory personnel and two (2) reliable employees, approved by the Union, shall inspect the operation in question within twenty-four (24) hours and shall decide what steps, if any, are necessary to correct the hazard.

In the event the committee cannot agree, the employee involved may then file a grievance in Step 2 of the grievance procedure. It is understood and agreed that if a grievance is filed on an unsafe working condition, management and Union representatives shall give said grievance preferred handling, and shall expedite its movements through the grievance procedure.

The employee may on request, be relieved from the job and be assigned to other work at the discretion of the Company. If an employee exercises his rights under this section and the Company believes conditions are not beyond the normal hazards inherent in

The district court granted Steelworkers motion for summary judgment, explaining (App. 8a-9a):

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the operation in question, nothing contained in this section shall abridge the rights of the Company under other sections of this Agreement.

Neither shall the foregoing preclude the Company from assigning another employee to the job in question and it is further understood that no employee, other than communicating the facts, shall take any steps to prevent another from working on the job.

3. A Safety Committee consisting of three employees designated by the Union and three Management members designated by the Company shall be established. By mutual agreement, the committee may be increased to not more than six representatives for each party. The safety committee shall hold regular meetings at times determined by the committee. The function of the safety committee shall be to advise with the Plant Manager concerning safety and health matters but not to handle grievances. In the discharge of its function the safety committee shall: Consider existing practices and rules relating to safety and health, formulate suggested changes in existing practices and rules, and recommend adoption of new practices and rules. Advices of the safety committee, together with supporting suggestions, recommendations and reasons shall be submitted to the Plant Manager for his Company's responsibility to provide for the safety and health of its employees during the hours of their employment and the mutual objectives set forth in Section 1.

4. A Union member and a Management member of the safety committee may accompany the State Mine Inspector or his Deputy, on any inspection made at the property.

5. Two men shall be designated by the Union to accompany the Safety Engineer on tours of the mine. Once each month, one of these two men, together with the Safety Engineer, shall make a tour of a section of the mine. The results of this tour shall be considered at the following Union-Management safety committee meeting.

6. In the event a recommendation with respect to safety conditions that needs action immediately concurred in by a majority of the entire committee, is not carried out, the Union may have recourse to the grievance procedure."

It is apparent that the Union, under federal law, owes the duty of fair representation to its membership and that such duty includes the statutory obligation to serve the interest of all members without hostility or discrimination towards any, and to exercise its discretion with complete good faith and honesty, and to avoid arbitrary conduct. • • •

Negligent performance of its contractual duties does not state a claim under federal law for breach of fair representation. Plaintiffs' Complaint is grounded solely on recognized principles of tort law and the federal labor act does not recognize that responsibility of the Union in its representative capacity.

It would serve no useful purpose here to discuss the whys and wherefores of the national labor policy, but suffice it to say that federal labor law has preempted the field of union representation and its obligation to its membership and has elected to define the duties imposed on the Union, which does not include the field of negligence.

On appeal, the Idaho Supreme Court reversed, holding that even with respect to the manner in which Steelworkers administered and enforced t' e safety and health provision of its contract, the federal duty of fair representation does not supplant or pre-empt plaintiffs' state law negligence claim.[4] In reaching that conclusion the court's reasoning

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[4] The court's opinion and judgment are dispositive on this point and thus represent a final determination reviewable by this Court. As noted, the complaints allege that Steelworkers are liable for damages arising from the miners' deaths because Steelworkers "negligently" performed certain representational services. The district court ruled that "federal labor law has preempted the field of union representation and its obligation to its membership and has elected to define the duties imposed on the Union, which does not include the field of negligence" (App. 8a-9a). Plaintiffs' assignment of error advanced on their appeal to the Idaho Supreme Court, stated in pertinent part: "The District Court erred in granting Defendant Steelworkers' Motion for Summary Judgment, in that negligence actions are not pre-empted by federal labor

was two-fold. First, the doctrine of pre-emption does not apply:

> We believe the interests protected by state wrongful death statutes are unrelated to those governed by federal labor laws and we ascertain no conflict which will necessarily arise between the state and federal authorities as a result of permitting such traditional litigation in the state courts.

(App. 18a). Second, in any event, even assuming that the

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law. . . ." Appellants' Brief, 4. And the Idaho Supreme Court accepted that claim. It recognized that "plaintiffs allege negligence on the part of the Union," and held that "[i]f a union's unreasonable conduct results in the death of one of its members, it should not be excused from liability [under state law] because of the legal fortuity of its organizational status" (App. 12a, 17a). State law issues may arise on remand, and the pre-emption issue may be mooted by their resolution. But there is sufficient justification for immediate review of the federal pre-emption question finally determined by the Idaho Supreme Court inasmuch as "a refusal immediately to review the state-court decision might seriously erode federal policy." *Cox Broadcasting Corp. v. Cohn,* 420 U.S. 469, 482-486 (1975). As we will elaborate in this petition, until the issue presented herein is authoritatively resolved unions will be reluctant to negotiate safety and health provisions in collective bargaining agreements. Thus, "failure to decide the question now will leave [unions] operating in the shadow of the civil [liability permitted] by a rule of law . . . the constitutionality of which is in serious doubt." *Id.,* at 486. Cf. *Construction Laborers v. Curry,* 371 U.S. 542 (1963).

Judge Bakes' concurring opinion (joined by two other judges—of the five member court—who also joined Judge Shepard's opinion for the court) states that a final determination of the question whether plaintiffs' wrongful death actions against Steelworkers is pre-empted by federal law must await "full factual development of the legal issues raised under . . . state tort law" (App. 55a). But the nature of plaintiffs' claims was set forth with particularity in their complaints. As we have noted, the complaints allege that Steelworkers performed certain specified acts negligently, that such

pre-emption doctrine would otherwise apply, the court opined that nevertheless the federal interest in regulating the Union's administration and enforcement of its collective bargaining agreement "is tangential at best" and "we see no possibility that the federal labor laws will be thwarted by requiring the Union to answer in state court to the claim that [its negligence in respect of its contract enforcement and administration] wrongfully caused the death of these survivors' decedents" (App. 19a). Thus, in

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acts were jointly and severally the proximate cause of the miners' deaths, and that plaintiffs are accordingly entitled to a damages award. See pp. 3-4, *supra.* No other claims were advanced in the complaints against Steelworkers. The allegations just described thus frame the pre-emption issue raised by this case. The district court decided the pre-emption issue on the basis of these allegations. And the Supreme Court of Idaho dispositively determined that actions based on such allegations are not pre-empted by federal law. Short of insertion of claims or allegations not now contained in the complaints, nothing that could occur in the proceedings on remand will disturb the predicate for the judgment of the Idaho Supreme Court, *i.e.,* the allegations of the existing complaint. Thus, as a practical matter, the issue presented herein has been finally determined. See *Cox Broadcasting Corp.* v. *Cohn,* 420 U.S., at 478 n. 7 (requirements of finality should be given a "practical rather than a technical construction").

Examination of Judge Bakes' opinion indicates that his concern may not have been with the possible reopening of the federal pre-emption issue but with the possibility that the issue might be rendered moot by a subsequent determination that plaintiffs failed to state a claim under state law. Thus, Judge Bakes intimates that plaintiffs' actions might in substance be suits for breach of contract, not cognizable under Idaho's wrongful death statute. But, as we have just explained, *supra,* the possibility that the federal pre-emption issue might eventually be mooted by resolution of state law issues does not frustrate this Court's jurisdiction to review the federal pre-emption issue at this time because "a refusal immediately to review the state-court decision might seriously erode federal policy." *Id.,* at 483.

the court's view, "this case falls within those exceptions to the doctrine of preemption previously announced by the United States Supreme Court" (App. 18a), citing *Farmer v. United Brotherhood of Carpenters,* 430 U.S. 290, 296-301 (1977), *Linn v. Plant Guard Workers,* 383 U.S. 53 (1966), *United Automobile Workers v. Russell,* 356 U.S. 634 (1958), *Machinists v. Gonzalez,* 356 U.S. 617 (1958), and *Sears, Roebuck v. San Diego County District Council of Carpenters,* 436 U.S. 180 (1978).[5]

REASONS FOR GRANTING THE WRIT

The court below decided an important question of federal law in a manner inconsistent with the principles established by this Court's decisions in *Vaca v. Sipes,* 386 U.S. 171, 188-195 (1967), and *Humphrey v. Moore,* 375 U.S. 335 (1964). The decision below, together with a similar decision

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[5] As noted, the State of Idaho was also named a co-defendant. With respect to the State, the complaints allege that it owed the miners a duty of due care under the Idaho Tort Claims Act, I.C. § 6-904, and, further, that duty was violated by virtue of the State's negligence. The specific acts of negligence alleged closely paralleled those alleged vis-a-vis Steelworkers. Thus, the complaints assert that the State, after having "undert[aken], pursuant to the Idaho Statutes, to inspect and enforce safety in the [Sunshine] mine," was negligent in that it failed to require fire drills, safety meetings, adequate personal protection equipment, adequate emergency means of escape, and mine evacuation upon discovery of smoke underground (App. 3a). The Idaho district court granted the State's motion for summary judgment on the ground that those claims were barred by the applicable portions of the Idaho Tort Claims Act which provides that the State shall not be liable for the acts or omissions of its employees "based upon the exercise or performance or failure to exercise or perform a discretionary function or duty . . ." (I.C. § 6-904). On appeal the Supreme Court of Idaho affirmed that portion of the district court's decision (App. 54a).

of the Missouri Court of Appeals,[6] creates a critical dilemma for unions that have negotiated or contemplate negotiating contractual provisions requiring management to protect the safety and health of employees. If by successfully negotiating worker safety and health provisions unions become vulnerable to state law negligence claims whenever an employee is injured on the job, unions may be compelled to forego such provisions. With consequences of this nature, the resolution of the issue presented by this case should not be put off to some later date.

1. Section 9(a) of the National Labor Relations Act of 1935, as amended, 29 U.S.C. §159(a), confers upon unions the right to serve as exclusive agent of all employees in bargaining units they are chosen to represent. The extraordinary scope of this right caused this Court to fashion and impose upon unions a concomitant federal duty vis-a-vis the employees they represent, the duty of fair representation. *Humphrey v. Moore, supra.* "A breach of the statutory duty of fair representation occurs only when a union's conduct toward a member of the collective bargaining unit is arbitrary, discriminatory, or in bad faith." *Vaca v. Sipes,* 386 U.S., at 190. The scope of this duty reflects a "careful balance of individual and collective interests. . . ." *Electrical Workers v. Foust,* 442 U.S. 42, 48 (1979). This federal duty of fair representation governs unions' conduct in negotiating, administering, and enforcing collective bargaining agreements. *Humphrey v. Moore, supra; Vaca v. Sipes, supra.* And, the duty is meant to displace any inconsistent obligations which might otherwise arise under state law. *Vaca v. Sipes,* 386 U.S., at 188-195. See generally, *Teamsters Union v. Morton,* 377 U.S. 252 (1964).[7]

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[6] *Hake v. Helton,* 564 S.W. 2d 313 (Ct. App. No. 28,896), cert. denied, 439 U.S. 959 (1978) (Justices Brennan, White and Marshall, dissenting).

[7] As Professor Archibald Cox explained:

> [In] [p]roviding a legal framework for self-organization and

Mere negligence does not constitute a violation of the federal duty of fair representation.[8] Thus, the decision of the court below subjects Steelworkers to a state law duty respecting its role in administering and enforcing its collective bargaining agreement which is more onerous than the federal duty.

The Idaho Supreme Court ruled that the state law duty may nonetheless be imposed, because "the interests protected by state wrongful death statutes are unrelated to those governed by federal labor laws" (App. 18a). However "[i]t is the conduct being regulated, not the formal description of governing legal standards, that is the proper focus of concern." *Motor Coach Employees v. Lockridge,*

collective bargaining, [the federal law] determin[ed] not only how far the conduct of employers and unions should be regulated but also how far they should be free.

* * * If the effectuation of national labor policy requires exclusion of state procedures and remedies for conduct of a kind prohibited by national policy, a fortiori *the national policy must require the exclusion of state efforts to impose different substantive restrictions within the area of labor-management relations.* The application of different substantive rules through state tribunals would multiply the effects of divergencies in procedure, remedies and interpretation of federal law. *The conclusion that inconsistent state substantive law must be ousted in favor of a uniform national policy . . . would therefore seem to be not only a logical inference but even the necessary predicate of the* [*pre-emption doctrine*]. . . . (Emphasis added.)

Cox, *Labor Law Preemption Revisited,* 85 Harv. L. Rev. 1337, 1352 (1972).

[8] *Dente v. International Organization of Masters, Mates and Pilots,* 492 F.2d 10, 12 (9th Cir. 1974); *De Arroyo v. Sindicato Trabajadores Packinghouse,* 425 F.2d 281, 284 (1st Cir. 1969), cert. denied, 400 U.S. 877 (1970); *Bazarte v. United Transportation Union,* 429 F.2d 868, 876 (3rd Cir. 1970).

403 U.S. 274, 292 (1971). And, as we have shown, the conduct being regulated is the manner in which the Union administered and enforced the contractual safety and health provision. The court below was simply wrong in "see[ing] no possibility that the federal labor laws will be thwarted by requiring the Union to answer" to the state law negligence claim (App. 19a). On the contrary, to impose a different standard of union liability from that which applies under federal law would by definition upset "the careful balance of individual and collective interests" that this Court has established in fashioning the duty of fair representation.[9]

2. While safety and health have long been recognized as mandatory subjects of collective bargaining, *NLRB v. Gulf Power Co.,* 384 F.2d 822 (5th Cir. 1967), it has been only in recent years that unions have begun to achieve significant worker protection provisions in collectively bargained agreements.[10] The agreement between Steelworkers and Sunshine Mining Company exemplifies the kinds of safety and health provisions that have thus far emerged: the creation of a joint labor-management safety committee, with the "function . . . to advise with the Plant Manager concerning safety and health matters [and in particular to] . . . [c]onsider existing practices and rules relating to safety and health, formulate suggested changes in existing practices and rules, and recommend adoption of new practices and rules"; Union participation in the monthly tour of the mine conducted by the Company's safety engineers; and Union participation in any mine inspection conducted by a state mine inspector."[11] The result reached by the court

[9] Thus, the predicate for the exceptions to pre-emption recognized in this Court's cases which the Idaho Supreme Court relied upon does not exist hereto. See p. 10, *supra.*

[10] *Safety Policies and the Impact of OSHA,* (BNA, May 1977).

[11] See note 3, *supra.* See generally BNA, Daily Labor Report, Sept. 13, 1978 at 3, E-1.

below threatens the continued development of such collectively bargained approaches to worker health and safety, and indeed even the maintenance of existing safety and health contract provisions.

The potential for litigation against unions of the type invited by the court below is staggering. During the decade 1960-1969, on-the-job accidents resulted in 140,000 worker deaths and nearly 21,000,000 worker injuries.[12] The victims of such accidents are generally foreclosed under the workmen's compensation system in place in their respective states from any tort recovery against their employers. Not surprisingly, therefore, in growing numbers such victims have looked for potential third party defendants and alternative sources for tort recoveries.[13] The standard of union liability accepted by the court below would make unions an attractive third-party target.

There is in this regard a significant difference between a negligence standard of liability and the standard established by the federal duty of fair representation. The latter was crafted by this Court with an eye to the realities of the manner in which unions provide representational services. Thus, this Court recognized that unions must, given the limitations of their resources, assess the various contract enforcement issues that arise, set priorities as to which to

[12] Statement of Chairman Williams, Senate Labor and Education Committee, Foreword to Legislative History of the Occupational Safety and Health Act of 1970 ("Leg. Hist.") at p. iii; see also, Leg. Hist., at 142-145, 844-845.

[13] The claims in the instant case against the Union and against the State of Idaho typify such efforts. We note in this connection that each of the plaintiff widows in this case was limited to a recovery of $35,000 from the Sunshine Mining Company under the Idaho workmen's compensation law. For a discussion of the general inadequacies of the schedule of workmen's compensation payments see Report of National Commission on State Workmen's Compensation Laws (GPO 1972).

pursue, and make judgments as to the means to be applied in any such pursuit. *Vaca v. Sipes,* 386 U.S., at 190-193; see also *Bryant v. International Union, United Mine Workers,* 467 F.2d 1, 5 (6th Cir. 1972), cert. denied, 410 U.S. 910 (1973). As a consequence, this Court understood that unions should not be liable for the mere failure to act. *Vaca v. Sipes,* 386 U.S., at 190-192. And that understanding led the Court to the further determination not to subject unions to liability for failures to act that would constitute no more than negligence. Rather, the Court has cast the rule to make clear that "[a] breach of the statutory duty of fair representation occurs *only* when a union's conduct toward a member of the collective bargaining unit is arbitrary, discriminatory or in bad faith." *Id.,* at 190 (emphasis added).[14]

A negligence standard, such as that accepted by the court below, flies in the face of the realities of union representation upon which this Court fashioned the federal duty. It would subject unions to potential litigation every time a judgment is made not to put union resources into pursuit of a particular contract right. And, as is reflected by the facts of this case, such judgments are made not by persons who possess expert scientific or engineering knowledge but by bargaining unit employees who have been chosen to serve as local union officials.

The issue whether unions that have successfully negotiated safety and health contract provisions may be subject to state law negligence suits based on on-the-job injuries or deaths has been arising with increasing frequency. The decisions in such cases have reached conflicting results. As mentioned above, the Missouri Court of Appeals has reached the same result as the Idaho Supreme Court did in the instant case.[15] The contrary result has been reached by the United States District Court for the District of

[14] See also, cases cited at note 8, *supra.*

[15] *Hake v. Helton, supra.*

Idaho, and state courts in New Jersey, Pennsylvania, and Washington.[16] Given that the issue arises when plaintiffs bring state law negligence suits directed at union conduct governed by the duty of fair representation, it is reasonable to expect that state courts will continue to be the situs of most of the litigation respecting the federal question presented here.[17] And, the conflict which exists among the various courts cited above accordingly assumes a dimension which calls for resolution of the question by this Court.

Moreover, it is critical that this question be resolved as soon as possible. While the question remains in doubt, the prospect of union liability in negligence growing out of safety and health provisions in collective bargaining agreements will at least chill the further adoption and evolution of such provisions, and possibly threaten the continued existence of those already in effect. As the Sixth Circuit has stated, in *Bryant v. International Union, United Mine Workers,* 467 F.2d, at 5-6, such a result would "not serve the interest of [employees] and would retard rather than advance the goals of the National Labor policy":

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[16] *House v. Mine Safety Appliance Co.*, 417 F.Supp. 939 (D. Idaho, 1976); *Brooks v. N.J. Manufacturers Insurance Co.*, 170 N.J. Superior Ct. 20, 405 A.2d 466, 103 LRRM 2136 (N.J. Sup. Ct., App. Div., 1979); *Farmer v. General Refractories Co.*, —— Pa. Superior Ct. ——, —— A.2d —— (Pitts. Div., No. 991, Oct. 26, 1979); *Carollo v. Forty-Eight Insulation, Inc.*, 252 Pa. Superior Ct. 422, 381 A.2d 990 (1977); *Higley v. Disston, Inc.*, —— P.2d ——, 92 LRRM 2443 (Wash. Sup. Ct., 1976).

[17] Because pre-emption is a defense, such an action brought in state court is not removable to federal court on "federal question" grounds. *Louisville & N.R. Co. v. Mattlers*, 211 U.S. 149 (1908); *Brough v. United Steelworkers of America*, 437 F.2d 748 (1st Cir. 1971). And because for diversity purposes unions are citizens of every state in which they have a member, such suits almost invariably are not removable on diversity of citizenship grounds either. *Steelworkers v. Bouligny, Inc.*, 382 U.S. 145 (1965).

> This Court is not unfamiliar with the difficult and longstanding problem of ensuring safety in the coal mines of this country. We recognize the harsh plight of those who have lost the family breadwinner through the all too frequent intervention of mining disaster. The answer to their problem is not to pervert the collective bargaining process by reading into its instruments a liability which was never contemplated and duties which were never assumed in fact or in theory. To saddle labor unions with liability for the mine operators' failure to comply with standards introduced into the contract at the union's bidding would simply be to discourage the inclusion of similar or more effective standards in later contracts. Such result would not serve the interest of miners and would retard rather than advance the goals of the National Labor policy.

(Footnote omitted).

CONCLUSION

For the reasons stated above, this Court should grant certiorari to review the Idaho Supreme Court's determination of the federal question presented herein.

Respectfully submitted,

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